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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SIX

THE PEOPLE,

Plaintiff and Respondent,

v.

JEFFREY SHAWN JENKINS,

Defendant and Appellant.

2d Crim. Nos. B288755,
B288936, B288951
(Super. Ct. Nos. BA359419,
BA428672, BA308156)
(Los Angeles County)

Jeffrey Shawn Jenkins appeals an order denying a petition for dismissal of his 2009 conviction for sale or transportation of marijuana pursuant to Proposition 64, the Control, Regulate and Tax Adult Use of Marijuana Act. (Health & Saf. Code, §§ 11360, 11361.8, subd. (e).)¹ We vacate the order and remand for further proceedings.

¹ All statutory references are to the Health and Safety Code.

FACTUAL AND PROCEDURAL HISTORY

Jenkins has long suffered from drug addiction and has an extensive criminal record dating from 1983. His criminal history includes at least 11 convictions for either possession of marijuana for sale or sale of marijuana. (§§ 11359, 11360.)

On January 26, 2018, Jenkins filed petitions pursuant to section 11361.8 seeking dismissal or resentencing of the following convictions, all resting upon guilty pleas: 1) case No. BA308156, a 2006 conviction for possession of marijuana for sale; 2) case No. BA359419, a 2009 conviction for sale or transportation of marijuana; and 3) case No. BA428672, a 2015 conviction for possession of marijuana for sale. The trial court summarily denied each petition, noting that Jenkins had four prior convictions for sale or transportation of marijuana and seven prior convictions for possession of marijuana for sale. The court concluded that the prior convictions rendered Jenkins ineligible for relief pursuant to section 11361.8, subdivision (e).

Jenkins appeals and contends that the trial court erred because the prosecutor did not establish by clear and convincing evidence that he is ineligible for relief in case No. BA359419. The Attorney General concedes. Jenkins has abandoned his contentions regarding the remaining two cases by not arguing the matters.

DISCUSSION

Proposition 64 legalized the recreational use of marijuana and reduced the penalties for various marijuana-related charges, including possession of marijuana for sale, and sale or transportation of marijuana. (§§ 11359, 11360.) The proposition also set forth a procedure to allow an individual to obtain postconviction benefit of the changes in the law if the individual

does not have a disqualifying prior conviction or convictions.
(§§ 11361.8, 11360.)

Section 11361.8, subdivision (e) provides: “A person who has completed his . . . sentence for a conviction under Section[] . . . 11360, whether by trial or open or negotiated plea, who would not have been guilty of an offense or who would have been guilty of a lesser offense under the Control, Regulate and Tax Adult Use of Marijuana Act had that act been in effect at the time of the offense, may file an application before the trial court that entered the judgment of conviction in his . . . case to have the conviction dismissed and sealed because the prior conviction is now legally invalid or redesignated as a misdemeanor or infraction in accordance with Section[] . . . 11360 . . . as . . . amended or added by that act.” Subdivision (f) provides: “The court shall presume the petitioner satisfies the criteria in subdivision (e) unless the party opposing the application proves by clear and convincing evidence that the petitioner does not satisfy the criteria in subdivision (e). Once the applicant satisfies the criteria in subdivision (e), the court shall redesignate the conviction as a misdemeanor or infraction or dismiss and seal the conviction as legally invalid as now established under the Control, Regulate and Tax Adult Use of Marijuana Act.”

At the time of Jenkins’s 2009 conviction in case No. BA359419, sale or transportation of marijuana was a felony. (Former § 11360, subd. (a).) In 2016, the electorate passed Proposition 64, legalizing marijuana use and amending sections 11359 and 11360, generally making them misdemeanor offenses. Section 11360, subdivision (a)(3)(B) now provides for a two-, three-, or four-year term of imprisonment, however, if the

defendant has “two or more prior convictions” for transportation or sale of marijuana.

The trial court erred by finding Jenkins ineligible for dismissal or redesignation pursuant to section 11361.8, subdivisions (e) and (f). Section 11360 now provides a lesser punishment for the conviction in case No. BA359419. Our review of Jenkins’s criminal history indicates that Jenkins suffered only one prior conviction for transportation or sale of marijuana at the time he committed the July 23, 2009 offense. Thus, there is no “clear and convincing evidence” that Jenkins had two or more prior convictions for transportation or sale of marijuana rendering him ineligible for dismissal or redesignation pursuant to section 11361.8. (§ 11361.8, subd. (f).)

The trial court must grant defendant relief unless it “determines that granting the petition would pose an unreasonable risk of danger to public safety.” (§ 11361.8, subd. (b); *People v. Smit* (2018) 24 Cal.App.5th 596, 600-601.) Accordingly, on remand the court must resolve this issue. (*Smit*, at pp. 603-604.)

The order denying the petition and finding Jenkins ineligible for resentencing in case No. BA359419 is vacated. The matter is remanded for further proceedings consistent with this opinion.

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GILBERT, P. J.

We concur:

YEGAN, J.

TANGEMAN, J.

David M. Horwitz, Judge

Superior Court County of Los Angeles

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Appeal, for Defendant and Appellant.

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